
IN THE
Supreme Court of the United States

OCTOBER TERM, 1941

No. 826

FEDERAL TRADE COMMISSION,
Petitioner,

v.

RALADAM COMPANY,
Respondent.

BRIEF IN BEHALF OF
RALADAM COMPANY

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TABLE OF CONTENTS

	PAGES
STATEMENT OF THE CASE	1-12
ARGUMENT	13-43
I. The decision of the lower Court in the preceding case, as affirmed by this Court, is <i>res adjudicata</i> of the issues which the Commission is now seeking to litigate in the case at bar.....	
	13-26
II. The Commission lacks the power to avoid the ruling of this Court and the lower Court, in the previous case, denying its petition to take further evidence on the existence of and injury to alleged competitors of respondent by instituting these new and independent proceedings for such purpose	
	27-32
III. The same considerations which compelled the setting aside of the Commission's order in the preceding case should compel a like result in the instant case, not only under the principle of <i>stare decisis</i> , but even though it were before the Court for the first time	
	32-43
A. Since the reviewing court must ultimately determine the question of what constitutes "unfair methods of competition in commerce," within the purview of the statute, in a given case, it is not limited, in reviewing findings of the Commission in this regard, as in reviewing mere findings of fact.....	
	33-37
B. The decision of the lower Court was rendered in accordance with <i>Federal Trade Comm. v. Raladam Co.</i> , 283 U. S. 643, and,	

hence, does not invade the province of the Commission to make findings of fact that are conclusive, if supported by substantial evidence 37-42

C. This Court rendered a correct decision in the preceding case when it held that evidence of the existence of substantial competition—that is injured or clearly threatened with injury to a substantial extent—is an essential prerequisite to an exercise of jurisdiction by the Commission..... 42-43

CONCLUSION 44-45

TABLE OF CASES AND AUTHORITIES

	PAGES
FEDERAL DECISIONS:	
Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Commission, 291 U. S. 587	28
Beloit v. Morgan, 7 Wall. 619	13
Blair v. Commissioner of Int. Revenue, 300 U. S. 5	25
Botany Worsted Mills v. United States, 278 U. S. 282	31
Chesapeake & Ohio Ry. v. McCabe, 213 U. S. 207	26
Chicago, Rock Island & Pac. Ry. Co. v. Schendel, 270 U. S. 611	26
Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371	18-19, 20, 26
Collier v. Stanbrough, 6 How. 14	13 note 16
Cromwell v. County of Sac, 94 U. S. 351	14
Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67	35
Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441	33-34, 35
Federal Trade Commission v. Gratz, 253 U. S. 421	33
Federal Trade Commission v. Klesner, 280 U. S. 19	28
Federal Trade Commission v. Pacific States Paper Trade Association, 273 U. S. 52	35
Federal Trade Commission v. Raladam, 283 U. S. 643	5 note 6; 12 note 15; 26 note 18; 33, 34, 35, 37, 41, 42
Federal Trade Commission v. Raladam, 282 U. S. 829	4
Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 463	28, 34
Federal Trade Commission v. Winsted Hosiery, 258 U. S. 483	41

Federal Trade Commission v. Western Meat, 272 U. S. 554	28
Gunter v. Atlantic Coast Line R. R., 200 U. S. 273....	26
National Labor Relations Board v. Columbian En- ameling & Stamping Co., 306 U. S. 292.....	36-37
Raladam Company v. Federal Trade Comm., 42 Fed. (2d) 430	3 note 3; 4 note 5; 12 note 14; 29
Raladam Company v. Federal Trade Comm., 123 Fed. (3d) 34	40
Scotland County v. Hill, 112 U. S. 183.....	26
Southern Pacific Railroad v. United States, 168 U. S. 1	15, 19
Stoll v. Gottlieb, 305 U. S. 465	26
Standard Oil Co. v. Federal Trade Comm., (C. C. A. 2nd Cir.) 273 Fed. 478	34, 35.
Tait v. Western Maryland Ry., 289 U. S. 620.....	22-23, 25
Treinies v. Sunshine Mining, 308 U. S. 66.....	26
United States v. California and Oregon Land Co., 192 U. S. 355	17-18
Werlein v. New Orleans, 177 U. S. 390.....	16-17

FEDERAL STATUTES:

Federal Trade Commission Act, Sec. 5 (Sec. 45, Title 15, U. S. C.)	1, 3, 5 note 7; 7, 20, 29-30, 32, 36
Federal Trade Commission Act (c.311, 38 Stat. 717, Title 15 U. S. C. Sec. 41 <i>et seq.</i>	27

MISCELLANEOUS:

Ruling Case Law, Vol. 25, p. 981, Sec. 229.....	31
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STATEMENT OF THE CASE

This is the *second* time the Federal Trade Commission has proceeded against the Raladam Company upon the *same* state of facts and for the *same* alleged violation of Federal Trade Commission Act. It is also the *second* time that this Court has been asked to review such proceedings, as will more fully appear from what follows.

Raladam Company, respondent herein (hereinafter referred to as the respondent), or its predecessors, have been engaged since 1909 or 1910 (R. 81) in selling to the retail or wholesale drug trade (R. 91) a pharmaceutical preparation called Marmola Prescription Tablets (R. 80). Marmola is manufactured for respondent by Parke, Davis & Company (R. 82-3), and is recommended for the treatment of obesity (R. 96-7).

The Federal Trade Commission, petitioner and appellant herein (hereinafter referred to as the Commission), first instituted proceedings against respondent on February 29, 1928. In the preceding case¹, the Commission alleged (1) that respondent was offering Marmola for sale throughout the United States "in competition with other persons who likewise engaged . . . in selling printed *professional advice*, *books* of information and instruction, and *other methods* and *means* and certain *remedies* and *appliances* for dissolving or otherwise removing excess flesh from the human body" (Old Rec. p. 3)² and (2) that "in aid of the sale" of Marmola respondent was representing that it was a "safe" and a "scientific" remedy for the treatment of obesity (Old Rec. pp. 3-4), which was alleged to be untrue, because the principal ingredient of Marmola is desiccated thyroid (Old Rec. p. 4) and "the use of thyroid for reduction . . . calls for constant professional observation, medical skill and

1—The record and proceedings in the preceding case were offered and received in evidence in the instant case as respondent's Exhibits 1-10 (R. 74-5 and 494-8), and, although not incorporated in the printed record, are before this Court as physical exhibits pursuant to stipulation (R. 71).

2—The printed record in the preceding case is respondent's Exhibit 1, as described in the foregoing footnote, and will be referred to throughout this brief, for the sake of convenience and to distinguish it from the Record in the instant case, as (Old Rec. p.).

care" (Old Rec. p. 5). As a result, it was alleged in said complaint that such representations had "the tendency and capacity to mislead the purchasing public" (Old Rec. p. 5) "to the *prejudice* of the public and *competitors* of respondent, Raladam Company, and constitute *unfair methods of competition*, within the intent and meaning of Section 5 of an Act of Congress entitled 'An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914."

Respondent joined issue on these allegations in the preceding case; and the Commission, after a lengthy hearing, found its allegations to be correct (Old Rec. 22-5)³. It based its findings, in this regard, (1) on the testimony of five doctors (Old Rec. pp. 71, 113, 139, 170-1 and 214), who opined that, while they all used desiccated thyroid, the principal ingredient of Marmola (Commission's brief herein, pp. 5-6), for the treatment of obesity (Old Rec. pp. 72, 93, 123, 145-6, 151, 176-7, 193-4, 216-7, 223-4 and 231), it was unsafe and unscientific for laymen to use it for self-medication under the Marmola directions (Old Rec. pp. 85, 115-6 119-20, 146, 184, 187, 221 and 222);⁴ and (2) on the testimony of Director of the Bureau of Investigation of the American Medical Association (Old Rec. pp. 110-12, 130-4, and 159-69), the

3—However, the trial-examiner for the Commission, who actually heard the witnesses testify, found that: "We appear to be involved in a scientific dispute the determination of which cannot safely or justly be predicated upon the evidence contained in the record." *Raladam Co. v. Federal Trade Commission*, 42 Fed. (2nd) 430, 432, see footnote.

4—The respondent produced six doctors (Old Rec. pp. 232-3, 269, 294-5, 323, 350 and 362), who held a contrary opinion to that of the Commission's five doctors (Old Rec. pp. 248-9, 251, 263-6, 276, 278-80, 305-7, 313, 333, 335, 347-8, 352, 363-4, and 365).

testimony of one of its doctors (Old Rec. 183-4), and one of respondent's exhibits (Old Rec. 91), concerning the existence of competition. As a result, the Commission ordered respondent to cease and desist from making such statements concerning Marmola (Old Rec. pp. 26-7).

Respondent then petitioned the Circuit Court of Appeals for the Sixth Circuit to review this order, in the preceding case (Respondent's Ex. 2); and, as a result, that Court entered a decree setting the same aside (Respondent's Ex. 5). The grounds of the Circuit Court of Appeals' decision, in this regard, were that the Commission had no evidence before it that would support (1) the essential finding that respondent's representations concerning the "safety" and "scientific" nature of Marmola as a treatment for obesity were false and misleading, *as a matter of fact*, as distinguished from a mere matter of opinion or (2) the *essential* jurisdictional finding that such representations were prejudicial to competitors of respondent and, thus, constituted "unfair methods of competition" within the meaning of the statute.⁵

On the petition of the Commission, this Court granted certiorari, in the preceding case, expressly limited, however, to the question of the jurisdiction of the Commission (282 U. S. 829). On final hearing, this Court held that the Commission lacked jurisdiction to proceed in a given case unless it had evidence before it that would support a finding of "unfair methods of competition" within the purview of the statute, which in turn required that "there be present or potential *substantial* competition, which is shown by proof, or appears by

⁵—*Raladam Co. v. Federal Trade Commission*, 42 Fed. (2nd) 480, 435, 437.

necessary inference, to have been injured or to be clearly threatened with injury, to a substantial extent, by the use of the unfair methods complained of." This Court then examined the record and found that, according to this test, the evidence before the Commission was insufficient to sustain such a finding;⁶ and, as a result, affirmed (Respondent's Ex. 10) the decree of the Circuit Court of Appeals for the Sixth Circuit, setting aside the Commission's order to cease and desist, as aforesaid.

The Commission thereupon petitioned, first, this Court, and then the Court of Appeals, under the procedure provided in Section 5 of the Federal Trade Commission Act,⁷ for leave to adduce "additional evidence, as to the competitors of . . . Raladam Company, and as to the injury to such competitors resulting from Raladam Company's unfair trade practices," but both this Court and the Court of Appeals denied such petitions (Respondent's Exs. 7 and 9). The petition filed by the Commission with the Court of Appeals, in this connection, contains a rather detailed description of the "additional evidence" of the alleged existence of competition and injury thereto, which the Commission was then seeking to adduce, as follows:

⁶—*Federal Trade Commission v. Raladam Company*, 233 U. S. 643, 651, 652-54.

⁷—Sec. 5 of the *Federal Trade Commission Act* (Sec. 45, Title 15, U. S. C.) provides, in part, as follows:

" . . . If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. . . ."

"Counsel for the Commission has ascertained the facts to be, and, if authority to take additional evidence shall be granted to the Commission, counsel for the Commission is able to, and will adduce competent evidence to prove:

"(1) That for many years many remedies for obesity have been, and still are being, offered for sale and sold in interstate commerce by many persons, firms, associations, or corporations in competition with Raladam Company's product.

"(2) Certain of such remedies contain thyroid, the active agent in 'Marmola', which is the product of the Raladam Company.

"(3) Certain of such remedies containing thyroid are sold without the aid of advertisements or other statements or representations that such remedies are safe and harmless.

"(4) Certain of such remedies containing thyroid and are offered for sale and sold only to persons whose overweight or obesity is caused by glandular defects or for whom the use of thyroid has been ascertained to be safe and harmless.

"(5) Certain of such remedies do not contain thyroid and are in fact safe and harmless for all users thereof.

"(6) The false and misleading statements made by the Raladam Company to the effect that practically all cases of overweight are caused by defective thyroid glands, that its remedy cures such defects, and is a pleasant, effective, safe and harmless remedy for use by all purchasers, has the tendency and capacity to, and probably will, divert trade to the Raladam Company from its said competitors, to the prejudice and injury of such competitors and the public."

Having failed to obtain the permission of either this Court or the Circuit Court of Appeals to take such "ad-

ditional evidence" of the alleged existence of competition and injury thereto, as aforesaid, the Commission waited a little over three years,⁸ and then commenced the new and independent proceeding, which is now before this Court. This proceedings was brought under the same statute, as the preceding case, viz., Sec. 5 of the *Federal Trade Commission Act*, and was brought prior to its amendment by the Act of March 21, 1938, 15 U.S.C. Sec. 45.⁹ The parties are the same in this case as they were in the preceding case. In addition, the subject matter was, or could have been, the same in the preceding case, as it is in the case at bar, had the Commission so willed it.

At the time of the issuance of the Commission's complaint in the preceding case, not only did respondent have alleged competitors of precisely the same kind and calibre as those which the Commission has attempted to prove herein, but respondent was then making exactly the same "statements, assertions and representations," regarding Marmola, as it was making when this case was commenced.

As to alleged competitors, this statement is readily verified, first by comparing the allegations of "Paragraph Four" of the complaint in the preceding case (Old Rec. p. 3) with "Paragraph Three" of the amended complaint herein (R. 45); and second, by comparing the findings of the Commission in the instant case, regarding

⁸ The order of the Circuit Court of Appeals for the Sixth Circuit, denying the Commission's petition to adduce such "additional evidence" was entered in the preceding case on February 5, 1932 (Ex. 7), and the Commission instituted these proceedings in May of 1935 (Commission's brief herein, p. 4).

⁹ See pp. 24 of Commission's brief herein, and particularly the footnote on page 2 thereof.

competition (R. 18-21), with (1) the evidence of alleged competition actually before the Commission in the preceding case (Old Rec. 91, 110-12, 130-4, 159-69, and 183-4), and (2) the Commission's own description of the "additional evidence" of competition, which it unsuccessfully sought permission to adduce in the preceding case, as aforesaid, *supra*, page 6. When this is done, it will be found that not only are the allegations of the two complaints, concerning competition, *identical in every fundamental detail*, but, more important still, that the evidence before the Commission, on this question in each case, is by any qualitative test, *exactly the same* in all essential details.

That respondent, at the time the preceding case was commenced, was making *each and every one* of the "statements, assertions and representations," regarding Marmola, upon which the Commission has based its amended complaint herein, can be verified, by comparing paragraphs "Ten," through "Sixteen" of the Commission's amended complaint in the instant case (R. 49-53) with respondent's answer to "Paragraph Two" of the complaint in the preceding case (Old Rec. pp. 8-12, and see Appendix to this brief), wherein respondent set forth, *verbatim*, most of the representations it was making, regarding Marmola, *at that time*.¹⁰ When

10—There is one exception to the foregoing statement, viz., the representation, counted upon in "Paragraph Sixteen" of the Commission's amended complaint herein, that: "We feel a responsibility to those who buy Marmola and wish them to know all of the facts at our command" (R. 52), which was apparently omitted from respondent's answer to "Paragraph Two" of the complaint in the preceding case through inadvertence. However, this is of no moment, because the Commission has gone to considerable trouble in the instant case to establish that this representation was being made by respondent *before, at the time of, and after* the issuance of the complaint in the preceding case (R. 651-59). In fact, the Commission introduced three Exhibits for this purpose (Comm'n's

this is done, it will appear that respondent was making *each and every one* of the representations, upon which the Commission has based its amended complaint herein, *at the time* it issued its complaint in the preceding case, with the result that they all *could have been* counted upon therein, had the Commission seen fit to do so.

The most that can be said of the Commission's amended complaint in this case is that it is based upon some additional representations which respondent was making at the time the preceding case was commenced, and which were then available as a basis therefor; had the Commission desired to make such use of them. Moreover, in the case at bar, *as in the preceding case*, the evidence which the Commission again adduced, in the attempted proof of the alleged falsity or misleading character of these representations, is testimony by doctors that, while they would use desiccated thyroid in the treatment of obesity caused by thyroid deficiency (R. 183, 187, 193, 237, 238, 284, 329, 344, 352, and 358), they were of the *opinion* that it was unsafe for a layman to do so, under the Marmola directions and instructions, without the continued supervision of a physician (R. 187, 225, 234, 281, 2, 296, 326, and 347); and *again* the respondent produced expert testimony to the contrary (R. 505, 521, 533, 567, 571, and 604).

Upon such evidence as to the existence of alleged competition and as to the alleged dangerous character of

10—(Continued):

Ex. 43, R. 651; Comm.'s Ex. 44, R. 653; and Comm.'s Ex. 45, R. 656). While there may be some question as to whether this proof establishes that respondent was making this representation *after* the issuance of the Commission's complaint in the preceding case on February 29, 1928 (Old Rec. p. 6), it conclusively establishes that it was being made *before* and *at the time* thereof (R. 652), and hence, *could have been* counted upon by the Commission therein.

Marmola for self-medication, hereinabove discussed, the Commission *again* found (R. 15-39), *first*, that Marmola was in competition with divers "*medicines, preparations, systems, methods, books of instruction, and other commodities, articles and means* designed, intended and used for the purpose of effecting weight reduction" (R. 17);¹¹ and, *second*, that respondent's representations regarding Marmola, counted upon in the amended complaint herein, are false and misleading, primarily because a "patient taking desiccated thyroid in any case should be observed and examined at *regular intervals* by one *trained and experienced in such work* to determine its effects and whether symptoms are apparent indicating *possible harmful results* or that treatment should not be continued farther and that the ordinary layman, *treating himself or herself*, is not competent to judge when resulting symptoms indicate harm" (R. 23-4), with the result "That Marmola (desiccated thyroid) cannot be used generally for reducing purposes by *self-medication* without the *possibility* of harmful results" (R. 33).¹²

Based on these findings the Commission concluded that: "The aforesaid acts and practices of the respondent, Raladam Company, are to the *prejudice* of the public and of respondent's competitors, and constitute unfair methods of competition in commerce, within the intent and meaning of Section 5 of" the Federal Trade Commission Act (R. 39).¹³ On the same day, the Com-

11—The Commission made substantially the same finding in "Paragraph Four" of its Findings in the preceding case (Old Rec. 22).

12—The Commission made substantially the same findings in "Paragraph Seven," subsections 2, 3, 7, 8, 9, and 10, of its Findings in the preceding case (Old Rec. 23-4).

13—This is the identical "Conclusion" which the Commission arrived at in the preceding case (Old Rec. p. 25).

mission again issued an order to cease and desist against the respondent (R. 40-44), which, though amplified in verbiage and somewhat changed in form, is the *same* in substance, as its order to cease and desist in the preceding case (Old Rec. pp. 26-7).

In view of the foregoing, respondent *again* petitioned the Circuit Court of Appeals for the Sixth Circuit to review and set aside the order of the Commission in the instant case (R. 1-15), on the following grounds:

- (1) The preceding case is *res adjudicata* of the issues now sought to be litigated by the Commission herein.
- (2) The Commission lacks the power to avoid the ruling of this Court and the Circuit Court of Appeals for the Sixth Circuit in the previous case, denying it the right to adduce additional evidence as to competition and injury thereto, by instituting these new and independent proceedings for such purpose.
- (3) The same considerations which compelled the setting aside of the Commission's order in the previous case should compel a like result in the instant case, not only under the principal of *stare decisis* but even though it were before the Court for the first time:

On October 7, 1941, the Circuit Court of Appeals for the Sixth Circuit, selecting as a basis for its action the third ground urged upon it by respondent, as aforesaid, again set aside the order to cease and desist, issued by the Commission against respondent, because "There was no substantial evidence supporting the formula of the Su-

preme Court 'that these advertisements substantially injured or intended to injure the business of any competitor . . . ' within the meaning of the statute (R. 784), this being one of the grounds of that Court's decision in the preceding case,¹⁴ and the ground upon which this Court affirmed the same.¹⁵

14—*Raladam Company v. Federal Trade Commission*, 42 F. (2d) 430, 437.

15—*Federal Trade Commission v. Raladam Company*, 283 U. S. 643, 651, 652-4.

ARGUMENT

- I. The decision of the Lower Court in the preceding case, as affirmed by this Court, is *res adjudicata* of the issues which the Commission is now seeking to litigate in the case at bar.¹⁶

The principal is well settled by the repeated decisions of this Court. that once a plaintiff has brought a proceeding, in which he has had the *opportunity* to present (1) *all* the issues *necessarily* involved therein, and (2) *evidence* bearing on *such* issues the final judgment therein is *res adjudicata* of *all such* matters, whether the plaintiff took advantage of such *opportunity* or not.

One of the early cases, in which the foregoing principal was applied, is that of *Beloit v. Morgan*, 7 Wall. 619, 621-3, 622-3. The pertinent parts of the opinion of this Court in that case, in which the facts are sufficiently set forth, read as follows:

“On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities—though not the same with those in question in this case. The parties were identical, and the title involved was the same. All the objections taken in this case might have been taken in that. The judgment of the court could have been invoked upon each of

¹⁶—In settling aside the order to cease and desist issued by the Commission against respondent herein, the lower Court did not base its decision on respondent's plea of *res adjudicata* (R. 781). However, under the familiar doctrine, applied by this Court in *Collier v. Standbrough*, 6 How. 14, 21; that the decision of a lower court will be affirmed on appeal on any ground appearing in the record, respondent again urges that the doctrine of *res adjudicata*, standing alone, requires affirmance here.

them, and if it were adverse to the appellant, he might have brought the decision here by a writ of error for review. The court had full jurisdiction over the parties and the subject. Under such circumstances, a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between same parties touching the same subject-matter, though the *res* itself *may* be different.

“ . . . Such has been the rule of the common law from an early period of its history down to the present time. But the principle reaches further. It extends not only to the questions of fact and of law, which were decided in the former suit, *but also to the grounds of recovery or defence which might have been, but were not, presented.* (Italics ours.)

“

“A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction. The judgment at law established conclusively the original validity of the securities described in the bill, and the liability of the town to pay them. . . .”

In the leading case of *Cromwell v. County of Sac*, 94 U. S. 351, 352-3, this Court, in discussing the scope of the bar of a former adjudication of the same controversy on any subsequent effort to re-litigate it, said:

“ . . . It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to *any other admissible matter* which might have been offered for that purpose. . . . The language, therefore, which is so often used, that a judgment estops not only as

to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot *again* be brought into litigation between the parties in proceedings at law upon *any* ground whatever."

(Italics ours.)

In *Southern Pacific Railroad v. United States*, 168 U. S. 1, 65, the United States Government brought suit to quiet title to certain lands acquired under the treaty of Guadalupe Hidalgo against the claim of the Southern Pacific Railroad, based upon certain patents. The principal issue in the case was whether certain maps filed by the Atlantic and Pacific Railroad in 1872 were valid maps of definite location—which disposed of the Railroad's claim, as the Government contended—or merely maps of general or preliminary route for the purpose of securing a preliminary withdrawal of the lands and, therefore, ineffective for such purpose. The Government contended that this same issue had previously been determined against the Railroad in another case between the same parties and could not be re-litigated in the case then before the Court. This Court, in upholding the Government, said:

"... Whatever is *new* in the evidence now before us, touching that matter, is *simply cumulative* on the one side or the other. The application to consider that evidence is *practically* an application for a rehearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rule of *res judicata*. Without, therefore, expressing any opinion as to the effect of this new

evidence relating to matters once finally adjudged, we hold that the Southern Pacific Railroad Company cannot, in this proceeding, question the validity of those maps as maps of definite location." (Italics ours.)


In the case of *Werlein v. New Orleans*, 177 U. S. 390, 398, 399-400, the City of New Orleans brought suit to recover certain lands from the defendant on the ground that he had no valid title thereto. The defendant pleaded *res adjudicata* and offered in evidence in support of such plea a decree against the City in a previous action it had brought to enjoin the execution sale at which the defendant acquired title. From a ruling of the trial court refusing to permit the defendant to introduce such decree in evidence the defendant appealed; and this Court, in holding that the trial court had committed error in so ruling, said:

"It is, however, contended that as the city had only set up *certain facts* as the foundation of its action to prevent the alleged illegal sale of the property, the judgment only bound it *as to those facts*, and therefore it is now urged that the city in this action was at liberty to prove *other facts* which would also show that Klein had no right to sell the property, namely, that the property had long before the sale been dedicated to public use, and the city therefore had no right to alienate it, nor had any one the right to sell it upon an execution issued on a judgment against the city.

.....

"... the question in this case is, what effect has this judgment under discussion upon the rights of the parties?

"The fact now alleged would have furnished in the chancery suit but *another ground or reason* upon which to base the claim of the city, that Klein had no right to sell the property under his writ.



In other words, it would have been *additional proof of the cause of action* set forth in that suit. . . .

"The threatened sale might have been illegal for a number of reasons, based upon widely divergent facts, but whatever those reasons were, the facts upon which they rested were open to proof in the chancery action, and if the city desired the benefit of them, they should have been alleged and proved. It would seem to be quite clear that the plaintiff could not be permitted to prove *each independent fact* in a *separate suit*. . . . If not, then on being beaten on a trial of that issue the city could commence still another action based on the allegation that the judgment had been paid. Thus, as many different actions as the city might allege grounds for claiming the sale would be illegal could be maintained *seriatim*, and no one judgment would conclude the city except as to the particular ground upon which the city proceeded in each particular case. And yet all these different grounds *would simply form evidence upon which the original cause of action was based*, namely, the alleged illegality of the apprehended sale. . . ."

(Italics ours.)

In *United States v. California and Oregon Land Co.*, 192 U. S. 355, 358, 360, the Government brought a suit to have certain land patents held invalid because lands covered thereby had previously been set aside for an Indian reservation. The defendant pleaded *res adjudicata* on the ground that the Government had brought an earlier case involving the same issue, in which judgment had gone against the Government. In an opinion sustaining the defendant's plea, Mr. Justice Holmes, speaking for this Court, said:

" . . . The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid

the patents by way of forfeiture. Now it seeks the same conclusion by a *different means*, that is to say, by *evidence* that the lands originally were excepted from the grant. But in *this*, as in the former suit, it seeks to establish its own title to the fee.

"... the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim [citing cases]; and, a *fortiori*, he cannot divide the grounds of recovery.

"... It would not be *consistent with the good faith of the United States* to attribute to it the intent to keep a concealed weapon in reserve in case these suits should fail.

(Italics ours.)

In the recent case of *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371, 375, this Court again applied the principle under discussion against the right of the plaintiffs to maintain an action on some bonds of an issue which had been the subject of an earlier action to which these same plaintiffs were parties, and in which there had been a decree of cancellation. This was done despite the fact that the earlier action had been brought under a statute that had been subsequently declared unconstitutional. In so doing, the Court said:

"... As parties, these bondholders had full opportunity to present any objections to the proceedings, not only as to its regularity, or the fairness of the proposed plan of readjustment, or the propriety of the terms of the decree, but also as to the validity of the statute under which the proceeding was brought and the plan put into effect. Apparently no question of validity was raised and the cause proceeded to decree on the assumption

by all parties and the court itself that the statute was valid. There was no attempt to review the decree. If the general principles governing the defense of *res judicata* are applicable, these bondholders, having the opportunity to raise the question of invalidity, were not *the less bound* by the decree because they failed to raise it. * * *

(Italics ours.)

In view of the foregoing decisions of this Court, no extended argument is necessary to show that the doctrine of *res adjudicata* is peculiarly applicable to the facts presented by the record in the case at bar (discussed, *supra*, pp. 1-12). In other words, it is apparent from the record herein that the Commission had "a full opportunity" in the preceding case to base its complaint therein on any and all of respondent's representations regarding Marmola upon which it now bases its amended complaint in the instant case. It is equally apparent that the Commission had "a full opportunity" in the preceding case "to present" evidence in the attempted proof of the allegations of the complaint therein on the question of unfair methods of competition within the purview of the statute.

If by any chance any portion of the evidence now offered was unavailable at the time the earlier case was heard—and this is not at all certain—it is perfectly clear that such evidence is wholly cumulative and that the Commission either did, or *could have produced*, had it then seen fit, other evidence of *precisely the same kind and calibre*—in fact *substantially identical evidence* which was then available. Having failed to offer such evidence in the preceding case, the Commission cannot avoid the effect by adduc-
like evidence in the case at bar (*Southern Pac. R. R. v. U. S.*, *supra*, pp. 15-6).

As we have already pointed out (*supra*, pp. 7-8), the truth of this statement may be easily verified, *first*, by comparing the allegations of "Paragraph Four" of the complaint in the preceding case (Old Rec. p. 3) with "Paragraph Three" of the amended complaint herein (R. 45); and; *second*, by comparing the findings of the Commission in the instant case regarding competition (R. 18-21) with (1) the evidence of alleged competition actually before the Commission in the preceding case (Old Rec. 91, 110-12, 130-4, 159-69, and 183-4), and (2) the Commission's own description of the "additional evidence" of competition, which it unsuccessfully sought permission to adduce in the preceding case (*supra*, p. 6).

Under these circumstances, it is clear—as this Court so aptly put it in the *Baxter State Bank* case (*supra*, pp. 18-9)—that the Commission "is none the less bound by the decree" in the preceding case merely because it failed to present such evidence of competition therein.

Nor does the foregoing comparative analysis of the pertinent parts of the record in each of these cases brought by the Commission against respondent afford the only support for such a conclusion. As a matter of fact, its verity is further established by the petition which the Commission presented, pursuant to Section 5 of the Statute,¹⁷ first, to this Court, and then to the lower Court in the preceding case (discussed, *supra*, pp. 5-6) after its decree setting aside the Commission's order to cease and desist had been affirmed by this Court. In this petition the Commission requested

17—See footnote 7^o (*supra*, p. 5) for text of provision under discussion, and, *infra*, pages 27-32 for discussion of effect of this petition as furnishing an independent bar to the commencement of the instant case, apart from the application of the doctrine of *res adjudicata*.

the lower Court to modify its decree so "as to provide that such decree of reversal is without prejudice to further proceedings before the Commission in this cause (1) for the taking of *additional* evidence as to the *competitors* of petitioner herein, Raladam Company, and as to the *injury to such competitors* resulting from Raladam Company's unfair trade practices and (2) for making of further findings of fact and a further order based on such additional evidence."

First this Court, and then the lower Court, after receiving the briefs of the Commission and respondent on the matter, entered orders denying the said petition (Respondent's Exs. 7 and 9); and it is submitted that these orders were, in effect, a direct adjudication of the question of the Commission's right to institute any further proceedings against respondent for the purpose of taking *additional* evidence on the question of *the existence of and injury to alleged competitors* of respondent.

Thus, not only has the Commission had its day in court in the preceding case on the very issues it is now seeking to re-litigate in the instant case, but, more conclusive still, it has had its day in court on the express question of whether it was entitled to conduct any further proceedings against respondent for the purpose of taking *additional* evidence on such issues. In other words, this Court is presented with a double basis for applying the doctrine of *res adjudicata* in the instant case, although either basis is sufficient.

In a feeble attempt to avoid this clear-cut application of the doctrine of *res adjudicata* to facts presented by the record herein, the Commission advances the following patently fallacious propositions in its brief:

"The judgment entered in *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, is not an absolute bar to the present proceeding because the proceeding is not upon the same claim as that made in the earlier case and does not present the same questions as were there determined. The respective claims involve conduct in different periods of time as well as materially different representations. Moreover, the prior case adjudged only the insufficiency of the particular evidence introduced in that proceeding; the present case concerns the sufficiency, not of that evidence, but of the totally different evidence introduced in this proceeding." (Commission's Brief pp. 12-13.)

The Commission advanced these same propositions in the Court below; and, in answer to the first proposition, respondent cited this Court's decision in *Tait v. Western Maryland Railway Co.*, 289 U. S. 620, 623, 624, and we again submit that this decision disposes of the same beyond peradventure. The pertinent parts of the Court's opinion read as follows:

"The petitioner seeks a reversal on the merits, asserting that a judgment in a suit concerning income tax for a given year cannot estop either of the parties in a later action touching liability for taxes of another year. * * *

* * * * *

"As petitioner says, the scheme of the Revenue Acts is an imposition of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status.

"This court has repeatedly applied the doctrine of *res adjudicata* in actions concerning state taxes,

holding the parties concluded in a suit for one year's tax as to the right or question adjudicated by a former judgment respecting the tax of an earlier year"

(Italics ours.)

However, the Commission insists, on pages 34-5 of its brief, that the foregoing decision is distinguishable from the present case. Its statement in this regard reads as follows:

"*Tail v. Western Maryland Ry. Co.*, 289 U. S. 620, upon which respondent relies, has no application to the present case because there the question in issue in the two cases was dependent upon the same historical events, whereas here the questions in issue in the two cases are dependent upon the varying and variable facts currently existing in two separate periods of time:"

"In suits upon different claims a prior judgment is not always conclusive as between the parties even where the question in issue is dependent upon the same historical events. *Blair v. Commissioner of Internal Revenue*, 300 U. S. 5. . . ."

In making any such statement, then, the Commission not only discloses that it has not carefully read the decision of this Court in the *Blair* case, which it cites in support thereof, as will be more fully hereinafter pointed out, but it completely begs the question. It does this by assuming that the preceding case and the instant case "are suits upon different claims," whereas they are *actually* suits upon exactly the same claim, so far as the proper application of the doctrine of *res adjudicata* is concerned. This conclusion is inescapable once the facts presented by the record herein (*supra*, pp. 1-12) are examined in the light of the foregoing decisions of this Court (*supra*, pp. 13-19).

As we have already pointed out, the most that can be said for the Commission is that the present case covers "a different period of time" than does the preceding case, but the important point is that during each of these two "periods of time" the respondent was making the same representations regarding Marmola (*supra*, pp. 8-9), and had either the same competitors or competitors of the same kind and calibre (*supra*, pp. 7-8); and the doctrine of *res adjudicata* is equally applicable under either of these situations.

In other words, the fact that two suits cover "different periods of time" is, in and of itself, of no particular importance so far as the application of the doctrine of *res adjudicata* is concerned, provided (1) the parties are the same, (2) the statute under which they are brought is the same, and (3) the subject matter is the same. In fact, such a situation frequently arises and, nevertheless, it has been invariably held by this Court that the final judgment in the former case is a complete bar to the second.

It is conceded by the Commission that both the parties and the statute involved in the preceding case and the case at bar are identical; but the Commission seems to think that because it has brought a proceeding covering "a different period of time" in which (1) it has counted upon some additional representations regarding Marmola which might have been covered in its complaint in the preceding case, had it seen fit to do so, and in which (2) it has adduced some additional evidence of competition of the same kind and calibre as it produced, or had a "full opportunity" to produce in the preceding case, it has successfully avoided the application of the doctrine of *res adjudicata*.

If any further authority—in addition to the foregoing decisions of this Court (*supra*, pp. 13-19)—including *Tait v. Western Maryland Railway Co.* (*supra*, pp. 22-23)—is needed to demonstrate that this is not so, it is furnished by the case of *Blair v. Commissioner of Internal Revenue*, 300 U. S. 5, cited on page 35 of the Commission's brief, as aforesaid, apparently through inadvertance or mistake. On page 9 of its opinion in that case this Court said:

“It is not necessary to review the respective contentions upon this point, as we think that the ruling in the *Tait* case is not applicable. That ruling and the reasoning which underlies it apply where in the subsequent proceeding, although relating to a different tax year, *the questions presented upon the facts and the law are essentially the same.* *Tait v. Western Maryland Ry. Co.*, *supra*, pp. 624, 626. Here, after the decision in the first proceeding, the opinion and decree of the state court created a new situation. The determination of petitioner's liability for the year 1923 had been rested entirely upon the local law. *Commissioner v. Blair*, 60 F. (2d) 340, 342, 344. The supervening decision of the state court interpreting that law in direct relation to this trust cannot justly be ignored in the present proceeding so far as it is found that the local law is determinative of any material point in controversy. . . .”

(Italics ours)

Finally, the Commission seems to intimate elsewhere in its brief that this Court was wrong and should reverse itself if it actually meant what it said in the preceding case. It was held therein that the Commission lacks jurisdiction to proceed in a given case unless it has evidence before it to support a finding of “unfair methods of competition” within the purview of the statute,

which in turn requires that "there be present or potential *substantial* competition, which is shown by proof, or appears by *necessary* inference, to have been injured or to be *clearly* threatened with injury to a substantial extent, by the use of the unfair methods complained of."¹⁸

With respect to the applicability of the doctrine of *res adjudicata* to the instant case, it makes no difference whether this Court rendered a correct decision in the preceding case or not. The doctrine applies with equal force in either event, as appears from the *Baxter State Bank* case, *supra*, pp. 18-19. This is also well settled by many other decisions of the Court, including *Chicago, Rock Island & Pacific Railway Co. v. Schendel*, 270 U. S. 611, 617. In that case this Court ruled:

"The Iowa court, under the compensation law, in the due exercise of its jurisdiction, having adjudicated *the character* of the commerce in which the deceased was engaged, that matter, *whether rightly decided or not*, must be taken as conclusively established, so long as the judgment remains unmodified * * *"

(Italics ours)

The following cases are other decisions of this Court in which there was a similar holding:

- Scotland County v. Hill*, 112 U. S. 183, 187;
- Gunter v. Atlantic Coast Line Railroad*, 200 U. S. 273, 290;
- Chesapeake & Ohio Railway Co. v. McCabe*, 213 U. S. 207, 221;
- Stoll v. Gottlieb*, 305 U. S. 165, 172; and
- Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 78.

¹⁸—*Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 651.

- II. The Commission lacks the power to avoid the ruling of this Court and the lower Court, in the preceding case, denying its motion to take further evidence on the existence of and injury to alleged competitors of respondent by instituting these new and independent proceedings for such purpose.

The denial by this Court (Respondent's Ex. 9), and then by the lower Court (Respondent's Ex. 7), of the Commission's petition to institute

"Further proceedings . . . (1) for the taking of additional evidence, as to the competitors of petitioner herein, Raladam Company, and as to the injury to such competitors resulting from Raladam Company's unfair trade practices" etc.

is an effective bar to these proceedings, apart from requiring the application of the doctrine of *res adjudicata* herein, as aforesaid (*supra*, pp. 20-21).

The Federal Trade Commission is purely a creature of statute, having only such powers and duties as are conferred upon it by the Federal Trade Commission Act, being an Act of Congress approved September 26th, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes" (R. 44), (c. 311, 38 Stat. 717, Title 15 U. S. C., Sec. 41 et seq.)

While the official title of the Act: viz., "An Act to create a Federal Trade Commission, to define its powers and duties" etc., makes it plain that the provisions thereof are intended to be not only a grant but a limitation upon the powers of the Commission, for it is submitted that the

generally accepted meaning of the word "define" is "to limit" (Webster's New International Dictionary), the following statements by this Court in some of its recent decisions establish the matter beyond peradventure:

"The powers of the Commission are limited by the statutes." (*Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463, 475)

"Section 5 of the Act * * * declares unfair methods of competition in commerce unlawful, *prescribes the procedure to be followed*, and gives the Commission power to require an offending party to cease and desist from such methods." (*Federal Trade Commission v. Western Meat Co.*, 272 U. S. 554, 557)

"While the Federal Trade Commission exercises under §5 the functions of both prosecutor and judge, the *scope of its authority is strictly limited*." (*Federal Trade Commission v. Klesner*, 280 U. S. 19, 27)

"The Commission is an administrative body possessing *only such powers as are granted by statute*." (*Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission*, 291 U. S. 587, 598)

(Italics ours)

Having established that "the powers of the Commission are limited by the statutes" (*Federal Trade Commission v. Sinclair Refining Co.*, *supra*) and that "Section 5 of the Act * * * prescribes the procedure to be followed * * *" (*Federal Trade Commission v. Western Meat Co.*, *supra*), the only inquiry remaining is as to what provision Section 5 of the Federal Trade Commission Act makes with reference to the institution of further proceedings against a respondent, as to whom an order to

cease and desist has previously been issued, which order has been reviewed and set aside by the Circuit Court of Appeals for the proper circuit, as in the previous case of *Raladam Co. v. Federal Trade Commission* (42 Fed. (2d) 430). We submit that this is the only inquiry remaining, because, under the controlling authorities immediately hereinabove discussed, the procedure provided by Section 5 of the Act is the only procedure open to the Commission.

Section 5 of the Act (Sec. 45 of Title 15, U. S. C.), which is the Section under which both the complaint in the previous case (Old Rec. p. 2) and the amended complaint in the instant case (R. 44) were issued, provides, among other things, that "unfair methods of competition in commerce are declared unlawful"; empowers and directs the Commission "to prevent . . . unfair methods of competition in commerce"; provides for the procedure to be followed by the Commission in such cases; gives the Circuit Court of Appeals, for the proper circuit, jurisdiction to review the orders to cease and desist issued by the Commission, either upon application for enforcement, filed by the Commission, or petition to review, filed by the respondent, and, in that connection, "power to make and enter . . . a decree affirming, modifying, or setting aside the order of the Commission"; and goes on to further expressly provide, as follows:

" . . . If either party shall apply to the court for leave to adduce *additional evidence*, and shall *show* to the satisfaction of the court that such *additional evidence is material* and that there were *reasonable grounds for the failure to adduce such evidence in the proceeding before the commission*, the court may order such additional evidence to be taken before the commission and to be adduced

upon the hearing *in such manner* and upon *such terms and conditions* as to the court may seem proper * * * (Italics ours)

Thus, it is apparent that Section 5 of the Federal Trade Commission Act makes *express* provision for the procedure to be followed in cases where the Commission seeks "to adduce *additional* evidence" on the issues in proceedings of the Commission, which have been reviewed and disposed of by the Circuit Court of Appeals for the proper circuit, as were the proceedings of the Commission in the preceding case. The provision, in question, also discloses that obtaining leave to adduce such "additional evidence" is not merely a formality, which follows as a matter of right or as the necessary consequence of making application therefor.

On the contrary, it is expressly provided that, as a condition precedent to obtaining any such leave to adduce additional evidence, the applicant "*shall show to the satisfaction of the court* that such additional evidence is *material* and that there were *reasonable grounds for the failure* to adduce such evidence in the proceeding before the Commission." In other words, the provision of Section 5 of the Act, now under discussion, clearly contemplates that the Circuit Court of Appeals shall have the *sole* power to determine, and then *only* upon a showing of the kind expressly provided for, whether the Commission shall conduct any further proceedings for the purpose of permitting, either itself or the respondent, to adduce additional evidence on issues on which the Commission has already conducted a hearing, made its findings and issued its order, and which proceedings and order have been reviewed and finally passed upon and disposed of by the Circuit Court of Appeals. Further-

more, if such permission is granted, the Court may *specify* the "*manner*" and the "*terms and conditions*," upon such "additional evidence" may be adduced, if at all,

In view of the foregoing considerations, it follows, *a fortiori*, that there is only one course of procedure open to the Commission in such cases, and that is to comply with the *express* requirements of the statute, creating and *empowering* it, which are applicable thereto. It quite obviously cannot avoid those requirements by any such naive device as instituting new and independent proceedings for the purpose of adducing such additional evidence. In fact, the Commission, by making its motion to the lower Court for leave to adduce additional evidence in the preceding case affirmatively recognized the requirement of the statute that it do so; and its institution of new proceedings, after that Court had denied its motion (Respondent's Ex. 7), can only be characterized as a patent attempt to circumvent such statutory requirement and the ruling of the lower Court, as aforesaid.

Before concluding this phase of the argument, there is a general principle of statutory construction that should be noted, because of its application to the question under discussion, and that is the principle of "*Expressio Unius Est Exclusio Alterius*." As this Court so tersely puts it in the case of *Botany Worsted Mills v. United States*, 278 U. S. 282, 289:

" . . . When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. . . . "

The principle of "*Expressio Unius Est Exclusio Alterius*" and its application are well discussed in 25 Ruling Case, Law 981, Sec. 229.

Therefore; it is submitted that there was only one method of procedure open to the Federal Trade Commission if it wanted to adduce additional evidence on the issue involved in the preceding case, and that was to follow the procedure outlined in Section 5 of the Federal Trade Commission Act, which has been hereinabove discussed. Having followed that procedure, which was the only course open to it, as aforesaid, and the lower Court having denied its application to conduct a further hearing for the purpose of *adducing* such *additional evidence*, the Commission has reached the end of the road. Consequently, the institution of these proceedings against respondent for the same purpose was highly improper as being beyond any power granted to the Commission, and as being, in effect, a power denied to it under the well settled principle of statutory construction known as "*Expressio Unius Est Exclusio Alterius*."

III. The same considerations which compelled the setting aside of the Commission's order in the preceding case should compel a like result in the instant case, not only under the principle of *stare decisis*, but even though it were before the Court for the first time.

The principal argument advanced by the Commission for reversing the lower Court is that it either incorrectly applied the decision of this Court in the preceding case (Commission's brief, pp. 13-23), or that such decision is wrong, insofar as it requires a "showing of injury to competitors," as a basis for the Commission to issue an order to cease and desist (Commission's brief, pp. 24-28). In developing the first of these alternative contentions, the Commission seeks to demonstrate that the lower Court interfered with the Commission's alleged

prerogative to make conclusive findings of fact, provided they appear to be supported by *any* evidence, and even though they involve conclusions of law. That the Commission is incorrect in this position, and that the lower Court has correctly applied the decision of this Court in the preceding case, will fully appear from the following discussion.

A. Since the reviewing court must ultimately determine the question of what constitutes "unfair methods of competition in commerce," within the purview of the statute, in a given case, it is not limited, in reviewing findings of the Commission in this regard, as in reviewing mere findings of fact.

This Court has repeatedly held, in a long line of decisions, commencing with *Federal Trade Commission v. Gratz*, 253 U. S. 421, and including the previous case of *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, that the question of what constitutes "unfair methods of competition in commerce" within the purview of the statute in a given case is one for ultimate determination by the courts rather than by the Commission. In the *Gratz case*, *supra*, this Court said on page 427 of its opinion:

"The words 'unfair methods of competition' are not defined by the statute and their exact meaning is in dispute. *It is for the courts, not the commission, ultimately to determine as matter of law what they include.* . . ."

(Italics ours)

In *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, 453, in affirming the decision in the *Gratz case*, and elaborating on the reasons therefor, this Court held:

“ . . . Congress deemed it better to leave the subject [‘unfair methods of competition’] without precise definition, *and to have each case determined upon its own facts*, owing to the multifarious means by which it is sought to effectuate such schemes. The Commission, *in the first instance, subject to the judicial review provided*, has the determination of practices which come within the scope of the act. (See Report No. 597, Senate Committee on Interstate Commerce, June 13, 1914, 63rd Cong., 2nd Sess.)”

(Italics ours)

In the previous case of *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 648, this Court, following its earlier decisions, again held that:

“ . . . Undoubtedly the substituted phrase [‘unfair methods of competition’] has a broader meaning *but how much broader has not been determined*. It belongs to that class of phrases *which do not admit of precise definition*, but the meaning and application of which *must be arrived at* by what this court elsewhere has called ‘the gradual process of judicial inclusion and exclusion.’ *Davidson v. New Orleans*, 96 U. S. 97, 104. The question is one for the final determination of the courts and not of the Commission. *Federal Trade Comm. v. Gratz*, 253 U. S. 421, 427; *Federal Trade Comm. v. Beech-Nut Co.*, *supra*, p. 453.”

(Italics ours)

In *Standard Oil Co. v. Federal Trade Commission* (C.C.A., 2nd Cir.), 273 F. 478, 481, which was affirmed by this Court in *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463, 465, it was held:

“ . . . And this rule [that ‘The question is one for final determination by the courts.’] is not avoided by [the Commission] stating as a finding of fact what is a mere conclusion of law. . . .”

Under the foregoing decisions, it is apparent that the question of what constitutes "unfair methods of competition," within the purview of the statute, in a given case, is one for ultimate determination by the courts rather than by the Commission. This is so, because "Congress deemed it better to leave the subject without precise definition, and to have each case determined on its own facts," with the result that "The Commission [merely], in the first instance, subject to judicial review, has the determination of practices which come within the scope of the act" (*Fed. Trade Comm. v. Beech Nut Packing Co.*, discussed *supra* pp. 33-4).

Hence, a court, in reviewing the finding of the Commission on this question, in a given case, has the right and, in fact, the duty to examine the record fully for the purpose of determining whether the evidence before the Commission is sufficient to sustain such finding, just as this Court did in each of the cases hereinabove discussed, including the previous case of *Federal Trade Commission v. Raladam Company*, *supra*, page 34; "And this rule is not avoided by [the Commission] stating as a matter of fact what is a mere conclusion of law" (*Standard Oil Co. v. Federal Trade Comm.*, discussed, *supra*, p. 34). Obviously, then, the function of the reviewing court, where such a finding of the Commission is challenged, is not merely perfunctory, the contentions of the Commission in the case at bar to the contrary notwithstanding.

The cases of *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U. S. 52, 62, and *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 73, cited by the Commission on page 19 of its brief, do not in any way impinge upon the principles laid down by this Court in the decisions hereinabove dis-

cussed. Those cases merely applied, under proper circumstances, the express provision of the statute (Sec. 45, Title 15, U. S. C.) that "The findings of the Commission *as to facts*, if supported by the testimony, shall be conclusive," and, therefore, held that where the Commission has evidence before it to support its inferences and findings, *as to matters of fact*, the reviewing court cannot make any independent appraisal of such evidence for the purpose of drawing different inferences or making different findings in regard thereto.

This of course presupposes the existence of substantial evidence in the record to support such inferences and findings. Hence it is clear, in addition, despite the confusion in which the Commission seems to frequently find itself regarding the matter, that its prerogative to make findings and draw inferences that are conclusive, providing there is evidence in the record, conflicting or otherwise, to support the same, does not include, and hence does not deprive the reviewing court of, the right to determine whether there is, in fact, any substantial evidence in the record.

In this connection it should particularly be noted that the inferences and findings of the Commission are not conclusive on the reviewing court, unless there is evidence in the record to support them, which is *substantial*. As this Court said in the recent case of *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299-300, in speaking of the conclusiveness of findings of a similar administrative tribunal:

"Section 10 (e) of the Act provides: " . . . The findings of the Board as to the facts, if supported

by evidence, shall be conclusive.' But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is *substantial*, that is, affording a *substantial basis of fact* from which the fact in issue can be reasonably inferred (citing cases)."

(Italics ours)

- B. The decision of the lower Court was rendered in accordance with *Federal Trade Comm. v. Raladam Co.*, 283 U. S. 643, and, hence, does not invade the province of the Commission to make findings of fact that are conclusive, if supported by substantial evidence.**

While the Commission devotes space in its brief to the discussion of such irrelevant matters as its finding concerning the care exercised by doctors in administering desiccated thyroid (Commission's brief, p. 6), and the dollar volume of Marmola sales per year (Commission's brief, p. 7) in what is apparently an attempt to confuse the issues and bias the Court against the respondent, the only contentions in the Commission's brief deserving of any discussion are, *first*, its contention that the lower Court has incorrectly applied the decision of this Court in the preceding case, and, *second*, its contention that, if such is not the case, this Court's decision in the preceding case is wrong.

This Court, in the preceding case, after holding on page 648 of its opinion that the question of what constitutes "unfair methods of competition in commerce," within

the purview of the statute, in a given case, "is one for the final determination of the courts and not of the Commission, as hereinabove noted, *supra* page 34, went on to point out, on page 651 of its opinion, that:

"While it is impossible from the terms of the act itself, and in the light of the foregoing circumstances leading up to its passage, reasonably to conclude that Congress intended to vest the Commission with the general power to prevent all sorts of unfair trade practices in commerce apart from their actual or potential effect upon the trade of competitors, it is not necessary that the facts point to any particular trader or traders.¹⁹ It is enough that there be present or potential *substantial* competition, which is shown by proof, or appears by *necessary* inference, to have been injured, or to be

19—As pointed out to the lower Court in respondent's petition for review herein (R. 13-15), it is apparent from the instant case, and the many other cases of like nature which the Commission has brought (Commission's brief, p. 23), that its real purpose is to suppress all trade in proprietary medicines designed to be used for self-medication in the treatment of obesity, and to thus create and foster a monopoly in the medical profession, in regard thereto, rather than to actually protect any trader or traders from unfair competition. The Commission has attacked the proprietary medicine industry upon two grounds: (1) That any product not containing thyroid, or a similar substance, is ineffective in obesity and therefore may not be advertised or sold, because to do so would violate the Act; or (2) That any product containing thyroid, or a similar effective agent, while it may be safely used by doctors, is not safe for *self-medication*. To accomplish this purpose it has played one proprietary medicine company against another, as being "the competition" it was allegedly seeking to protect, with a view to putting all of them out of business eventually, *ad seriatim*, as it were.

Hence, the effect of this insidious program is to pervert the Federal Trade Commission Act from its real purpose, by completely eliminating and suppressing all trade in this field, and by creating a monopoly in the medical profession in the use of all medicine for the treatment of obesity. Certainly, Congress never intended, when it passed this statute, to grant the Federal Trade Commission the power to foster such a monopoly, should it see fit.

clearly threatened with injury, to a *substantial* extent by the use of the unfair methods complained of."

(Italics ours)

This Court then proceeded to carefully analyze the evidence, which the Commission had before it on the hearing, and to conclude it was insufficient to support a finding essential to the Commission's jurisdiction that respondent was engaged "in unfair methods of competition" within the purview of the statute, due to the failure of such evidence to meet the test laid down on page 651 of its opinion, as *aforsaid*. The pertinent part of the Court's opinion in this connection is found on pages 652-53, and reads as follows:

"Findings of the Commission justify the conclusion that the advertisements naturally would tend to increase the business of respondent; but there is neither finding nor *evidence* from which *the conclusion legitimately can be drawn* that these advertisements *substantially* injured or tended thus to injure the business of any competitor or of competitors generally, whether legitimate or not. . . .

It is impossible to say whether, as a result of respondent's advertisements, any business was diverted, or was likely to be diverted, from others engaged in *like trade*, or whether *competitors*, identified or unidentified, *were injured* in their business, or *were likely to be injured*, or, indeed, whether any other anti-obesity remedies were sold or offered for sale in competition, or were of such a character as naturally to come into *any real competition*, with respondent's preparation in the interstate market. All this was left without proof and remains, at best, a matter of conjecture. *Something more substantial than that is required as a basis for the exercise of the authority of the Commission.*"

(Italics ours)

The lower Court in the instant case, after carefully reviewing the opinion of this Court in the preceding case to find the true basis thereof, and then reviewing and discussing the evidence before the Commission as this Court had done in the preceding case, as aforesaid, came to the unavoidable conclusion that such evidence was insufficient, under the test laid down in this Court's opinion, to support the Commission's jurisdictional finding that the respondent was engaged in "unfair methods of competition," within the purview of the Act. In this connection, the lower Court said (123 F. (2d) 34, 37-8) (R. 784-85):

" . . . There was *no substantial evidence* supporting the formula of the Supreme Court 'that these advertisements substantially injured or tended to injure the business of any competitor' . . ."

" . . . We find *no evidence* in the record upon which a *substantial inference* can be based that this was so. We cannot approve the finding of the Commission upon pure speculation. . . ."

(Italics ours)

Upon examining the Record, the lower Court found that the evidence, upon which the Commission had based its findings that respondent was engaged in "unfair methods of competition, within the intent and meaning of Section 5" of the statute was of essentially the same kind and calibre, and therefore subject to the same deficiencies found by this Court in the evidence before the Commission in the preceding case.

In other words, as in the preceding case, the Commission has again failed to adduce evidence from which it is possible "to say whether, as a result of respondent's advertisements, any business was diverted, or was likely to be diverted, from others engaged in like trade, or

whether competitors, identified or unidentified, were injured in their business, or were likely to be injured, etc." (Page 653 of this Court's opinion in the previous case, discussed, *supra*, p. 39).

Therefore, to epitomize the decision of the lower Court, it was bound to conclude, as it did conclude, that "There was no substantial evidence supporting the formula of the Supreme Court 'that these advertisements substantially injured or tended to injure the business of any competitor * * *,' " with the necessary result that the Commission's jurisdictional finding that the respondent herein is engaged in "unfair methods of competition in commerce, within the intent and meaning of Section 5" of the Act, is again lacking in evidence to support it.

With regard to the Commission's contention that the *Winsted Hosiery* case (258 U.S. 483) requires a different decision than the one arrived at by the lower Court herein (Commission's brief, pp. 17-20), it should be noted this same contention was urged upon this Court by the Commission in the preceding case, and was disposed of unfavorably to the Commission on pages 651-52 of the opinion therein. Thus, it is submitted that the Commission's pertinacity in this regard is worthy of a better cause.

In view of the foregoing, it is perfectly clear that the decision of the lower Court does not invade the province of the Commission to make findings of fact that are conclusive, if supported by *substantial* evidence. We have already seen in this connection that, in all cases, "The question is one for final determination of the courts and not of the Commission" (*Fed. Trade Comm. v. Raladam Co.*, and other cases discussed, *supra*, pp. 33-34); and that, in the instant case, the lower Court, after analyzing

the evidence in the Record, just as this Court had done in the previous case, based its decision squarely upon the fact that "There was *no* substantial evidence [before the Commission] supporting the formula of the Supreme Court 'that these advertisements substantially injured or tended to injure the business of any competitor . . .'" (R. 784). Hence, nothing more should be necessary to demonstrate that the Commission's contention that "the decision below" invades the province of the Commission to make conclusive findings of fact, if supported by substantial evidence is utterly unfounded.

We submit that the Commission has apparently again, as in the past, confused its prerogative to make conclusive findings of *fact*, if supported by substantial evidence, with the prerogative of the reviewing court to ultimately determine (1) whether there is, in fact, any *substantial* evidence to support the findings of the Commission, on matters of fact, and (2) what *legal results* follow from the facts *properly* found.

C. This Court rendered a correct decision in the preceding case when it held that evidence of the existence of substantial competition—that is injured or clearly threatened with injury to a substantial extent—is an essential prerequisite to an exercise of jurisdiction by the Commission.²⁰

While the Commission prefers not to put the matter thus baldly, the only possible intendment of the argument, on pages 24-8 of its brief, is that this Court should now reverse itself because the Commission thinks this Court rendered an incorrect decision in the preceding

²⁰—*Federal Trade Commission v. Rafanadan Company*, 283 U. S. 643, 651.

case when it held that evidence of the existence of substantial competition—that is injured or clearly threatened with injury to a substantial extent—is an essential prerequisite to an exercise of jurisdiction by the Commission. The Commission attempts to soften the harshness of its request in this regard with the statement that “the views expressed [by this Court] in that connection may be regarded as unnecessary” (Commission’s brief, p. 28).

Suffice it to say that a reading of this Court’s opinion in the preceding case requires the conclusion that not only was such holding *necessary* to the decision, but it was the principal basis thereof. This being so, we would feel presumptuous, to say the least, if we were to undertake a lengthy defense of the validity of such a well reasoned opinion, in which the Court carefully considered and passed upon the very contentions the Commission is again advancing herein.

CONCLUSION

In conclusion, then, it is submitted that the decision of the lower Court herein is correct, not only on the ground upon which it is based but on the additional grounds urged upon it by respondent, as aforesaid (*supra*, pp. 13-27 and 27-32).

It cannot be that an administrative tribunal, after unsuccessfully prosecuting a proceeding instituted by and before itself through the highest court in the land, can ignore all that has gone before, and start anew under the same statute against the same respondent, who has in no way changed his course of conduct, merely to bring forth additional evidence of the same kind and calibre as it produced, or which was available and it could have produced in the former proceeding. Certainly, under such circumstances, the respondent is entitled to the ordinary protection of the high principle of public policy that there shall be an end of litigation over a particular matter.

Furthermore, Section 5 of the Act expressly provides the procedure for adducing such additional evidence. It lays down the express conditions upon which the Commission shall be permitted to adduce it. Having availed itself of this procedure, albeit without success, the Commission has exhausted its remedies, and cannot, thus, patently circumvent the express provisions of the statute in the manner attempted herein.

In view of these considerations, it would seem that the principles of *stare decisis* and *res a'judicata*, so frequently applied by this Court in its decisions, furnish a

Compelling precedent for bringing any legal controversy to an end eventually, even though it be with the Commission, and respondent submits that this controversy has finally reached that stage.

Our judicial system has been built up on two fundamental concepts that are complementary, viz., (1) that every man is entitled to the "opportunity" of his day in court, and (2) that once he has been given such "ppportunity" his day is ended. It is submitted that these are concepts which must be preserved inviolate, if we are to continue to enjoy the benefits of a government of laws, instead of a government of men.

Respectfully submitted,

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Respondent.*

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APPENDIX*

"Fifth. Answering 'Paragraph Two' of the said complaint, respondent admits that it sells a medicinal preparation, in tablet form, for internal use by human beings, under the trade-name of Marmola Prescription Tablets. Respondent denies that, as is in said Paragraph Two charged, respondent commonly refers to said preparation

*For the Court's convenience, respondent's answer to "Paragraph Two" of the Commission's complaint in the preceding case (Old Rec. pp. 8-12) referred to supra pp. 8-9, is set forth in this appendix verbatim. The references in brackets following most of the paragraphs of said answer are to the paragraphs of the Commission's amended complaint in the instant case in which it has again counted upon these same representations.

In addition it should be noted that the Commission on page 31 of its brief attempts to argue that the instant case and the preceding Raladam case "are based upon substantially different misrepresentations." The Commission argues that in the preceding case the misrepresentations "charged and found" were that "Marmola is based upon 'scientific research,' is a 'scientific' method for treating obesity, and may be used without danger of harmful physical consequences." The Commission then says: "In the present case, on the other hand, the principal misrepresentations charged and found are" (1) "that thyroid deficiency is the usual cause of excess fat"; (2) "that administration of thyroid is the customary and accepted treatment for obesity"; (3) "that Marmola is an efficacious remedy for this condition"; (4) "that respondent's advertising discloses all the material facts concerning Marmola properties and effects." That all of these alleged misrepresentations could have been "charged" in the preceding case appears not only from this appendix, but also from the opinion of the lower Court in the preceding case wherein, as to such alleged misrepresentations, it is said:

- (1) "Obesity is very commonly the result, at least in part, of hypothyroidism" (42 F. (2nd) 430, 434);
- (2) "Thyroid furnishes the recognized treatment [for obesity], approved by all physicians" (42 F. (2nd) 430, 435);
- (3) "There is no denial of the therapeutic effect of Marmola as a treatment for obesity" (42 F. (2nd) 430, 435);

With respect to (4), as has hereinbefore been pointed out, in footnote 10 on pages 8 and 9 of this brief, the Commission went to considerable trouble to prove conclusively that this representation was being made before and at the time of the preceding case (R. 651-9) (Exs. 43, 44, 45).

as an 'obesity cure,' and denies that, as is there charged, respondent 'alleges' that said preparation is useful and effective 'in dissolving and removing excess flesh of the human body.'

"Respondent says that it does not allege, advertise, or otherwise hold out, that the said 'Marmola Prescription Tablets' are useful for 'dissolving,' or in any similar manner 'removing,' anything from the human body. Respondent says that what respondent alleges, advertises, and holds out in respect of said Tablets, appears from the label on the box in which said Tablets are sold to a consumer, and from the small pamphlet that is inserted in each said box, which said box and pamphlet are mentioned in 'Paragraph Five' of the said complaint; and that the following *excerpts* from the label on the said box, and from the said pamphlet, show the *gist* of what respondent alleges, advertises, and holds out in respect of the said Marmola Prescription Tablets, to-wit:

" 'Marmola is recommended as a treatment for the reduction of excessive fat' (Label).

" 'We state here all of the ingredients of Marmola. We do this so that you may know just what you are taking, and your physician may know if you wish' (Pamph. p. 19).

" 'Formula

1 grain Extract Bladderwrack,
1/2 grain Extract Phytolacca
1/4 grain Extract Cascara Sagrada
Rx. 87 Spec.

1/2 grain Desiccated Thyroid,
1/4 grain Phenolphthalein,
16/1000 min. Oleoresin Ginger,
Po. Saccharum special,

3 grains Calcium Carbonate Precipitated,
1/24 min. Methyl Salicylate,

2/24 min. Oil Anise,
 1/24 min. Oil Sassafras,
 Talc. Brown,
 Ivory Black,
 Aqua for Extracts,
 Po. Burnt Umber,
 Red Oxide of Iron,
 Syrupus Simplex,
 Lubricating Solution,
 Aqua for Granulating,
 Liquid Petroleum colorless.'

“ ‘Take one tablet after each meal and at bedtime, with enough water to swallow easily’ (Label; Pamph. p. 3).

“ ‘This treatment should be faithfully taken as directed, for 60 to 90 days in order to obtain the best results’ (Label).

“ ‘The right rule is to take Marmola until you reach normality. A table in this pamphlet tells your proper weight’ (Pamph. p. 15) [Par. *Fourteen* of Amended Complaint herein (R. 51)].

“ ‘Stop when you are satisfied; then if you start to gain again, take Marmola a while longer’ (Pamph. p. 15) [Par. *Fourteen* of Amended Complaint herein (R. 51)].

“ ‘Try not to miss a dose, for the cumulative effects are important’ (Pamph. p. 3).

“ ‘This dosage is not intended to lead to rapid reduction. It will rarely exceed 3 or 4 pounds a week’ (Pamph. p. 3).

“ ‘The rate of reduction differs with individuals. Habits also affect it’ (Pamph. p. 3).

“ ‘The time required differs with conditions. Some people need little, some much’ (Pamph. p. 15).

“‘Physicians in treating obesity often prescribe much larger doses of the Marmola factors. That is to hasten effects’ (Pamph. p. 4) [Par. *Eleven* of Amended Complaint herein (R. 49-50)].

“‘But the consensus of opinion is that the dosage we direct, if taken regularly, seems to best fit the average case’ (Pamph. p. 4) [Par. *Twelve* of Amended Complaint herein (R. 50)].

“‘The study has been to adapt it (i.e. the prescription) to the average case’ (Pamph. p. 19) [Par. *Twelve* of Amended Complaint herein (R. 50)].

“‘It (i.e. the prescription) is based on the opinion that a moderate rate of reduction serves the purpose best’ (Pamph. p. 19).

“‘Consult your own physician if you want special advice in any unusual condition. The Marmola prescription, made for the multitudes, considers the average person simply seeking to reduce. A physician, in extreme cases, might hurry the treatment. Or he might add certain factors. But that requires personal contact. If you desire more advice than we give in this book, get it from a man who can meet you. We do not prescribe in special cases by letter’ (Pamph. pp. 21-22) [Par. *Twelve* of Amended Complaint herein (R. 50)].

“‘If you are over-fat you probably have an under-active thyroid. Restoring that activity may mean much to you in other ways than fat reduction’ (Pamph. pp. 5-6) [Par. *Ten* of Amended Complaint herein (R. 49)].

“‘Many people with deficient thyroids gain fat whatever they do. Some are very active, some are small eaters. Yet they suffer the deformity of fat. Many people with over-active thyroids stay thin, however much they eat or rest. The object of Marmola is to help establish a normal gland condition’ (Pamph. pp.

11-12) [Par. *Thirteen* of Amended Complaint herein (R. 50-1)].

“ ‘The chief object of Marmola is to help correct thyroid deficiency. When that result shows in normal weight, it is well to stop Marmola’ (Pamph. p. 15) [Pars. *Thirteen* and *Fourteen* of Amended Complaint herein (R. 50-1)].

“ ‘You will probably find that the use of Marmola brings you new vim and vitality. That is because the thyroid influences other ductless glands. But our advisers do not recommend the taking of Marmola for that purpose after the weight becomes normal’ (Pamph. pp. 15-16) [Par. *Fourteen* of Amended Complaint herein (R. 51)].

“ ‘Excess fat may be consumed by certain activities, particularly gland activities’ (Pamph. pp. 10-11).

“ ‘The Marmola prescription contains desiccated thyroid taken from food animals. It is a concentrated food intended for weak thyroids, particularly when that weakness shows itself in obesity. The object is to restore a normal condition under which few people gain too much weight’ (Pamph. p. 11) [Pars. *Ten* and *Thirteen* of Amended Complaint herein (R. 49 and 50-1)].

“ ‘There is a time in starting Marmola when confidence is quite important. Gland conditions cannot be corrected over-night. Confidence should be based on the fact that Marmola contains the leading internal factor in fat reduction known to modern science. That factor is recognized the world over. No modern physician can reasonably dispute it. You have probably read articles by physicians in magazines, stating how an active thyroid affects fat’ (Pamph. pp. 12-13) [Par. *Eleven* of Amended Complaint herein (R. 49-50)].

“ ‘The chief purpose of Marmola is to feed and stimulate the thyroid gland, which controls the combustion of food in the body. It is also the main inspiration of other ductless glands. The object is to

aid in turning more food into energy and heat and less into fat, thus restoring a natural condition' (Pamph. p. 5) [Par. *Thirteen* of Amended Complaint herein (R. 50-1)].

" 'The makers of Marmola do not advise abnormal exercise or diet * * * But there is no question that reasonable habits in these respects greatly aid results. No matter how the thyroid may be stimulated and the combustion of food increased it is possible to offset much of the benefit by too lazy habits and too much food. Marmola is intended to aid reduction without radical, dangerous, or unpleasant methods. This method is scientific. It embodies the chief factors, if not the only factors, employed by modern physicians for the purpose intended. That is, for correcting a thyroid deficiency * * * But under-exercise and over-feeding naturally retard results. They may in extreme cases counteract them * * * Avoid starches and sweets in excess * * * Cut down fatty foods * * * Chew all foods well, even your soups * * * At every meal eat a little less than you need' (Pamph. pp. 6-10) [Pars. *Eleven* and *Thirteen* of Amended Complaint herein (R. 49-50 and 50-1)].

" 'If the use of Marmola tends to reduce the desire for fat-forming foods, or even your appetite, it is probably because those foods, being more largely turned into energy and heat, satisfy one more quickly' (Pamph. p. 9) [Par. *Thirteen* of Amended Complaint herein (R. 50-1)].

" 'The Marmola prescription is based on years of work here and abroad by scientists in the field of glandular therapy. Reports of this research work show that results were first proved on thousands of test animals, then on human beings. Marmola itself has been proving them for 20 years to countless men and women. The results and the reasons for them are well understood in the scientific world today' (Pamph. p. 8) [Pars. *Eleven* and *Twelve* of Amended Complaint herein (R. 49-50)].

“ ‘Marmola contains the leading internal factor in fat reduction known to modern science. That factor is recognized the world over. No modern physician can reasonably dispute it’ (Pamph. p. 12) [Pars. *Ten* and *Eleven* of Amended Complaint herein (R. 49-50)].

“ ‘Millions of men and women in the past few years have escaped the deformities of fat. That fact is largely due to the factors in Marmola, either taken in this way or on physicians’ prescriptions. This form of treatment is recognized by authorities the world over’ (Pamph. p. 14) [Pars. *Eleven* and *Twelve* of Amended Complaint herein (R. 49-50)].

“ ‘The main results are not direct, but they come through changing wrong conditions and tendencies’ (Pamph. p. 5) [Par. *Thirteen* of Amended Complaint herein (R. 50-1)].

“ ‘It is found that many have the idea that Marmola does something to destroy fatty tissue. On that account, many people fear that it may be harmful. It might be if it did that, but it does not’ (Pamph. p. 10) [Pars. *Ten* and *Eleven* of Amended Complaint herein (R. 49-50)].

“Respondent says that in said pamphlet (pp. 25-26) are printed two tables, taken from the World Almanac and Encyclopedia for 1922, which tables show average weights of men and of women, respectively, of various heights and ages [Par. *Fourteen* of Amended Complaint herein (R. 51)].

SUPREME COURT OF THE UNITED STATES.

No. 8264—OCTOBER TERM, 1941.

Federal Trade Commission, Petitioner,	} On Writ of Certiorari to	
vs.		the United States Circuit
Raladam Company.		Court of Appeals for the Sixth Circuit.

[April 27, 1942.]

Mr. Justice BLACK delivered the opinion of the Court

The Circuit Court of Appeals set aside a cease and desist order of the Federal Trade Commission upon the ground that certain findings were not supported by evidence. 123 F. 2d 34. The refusal of the court to enforce the Commission's order rested in part upon an interpretation of this Court's decision in a prior controversy between the same parties. *Fed. Trade Comm. v. Raladam Co.*, 283 U. S. 643. Because of the importance of questions raised, we granted certiorari.

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C. § 45, declares unfair methods of competition in commerce to be unlawful; empowers the Commission to prevent such methods; and authorizes the Commission after hearings and findings of fact to issue orders requiring violators "to cease and desist from using such method of competition." In 1929, the Commission, after hearings, found that the Raladam Company had used unfair methods of competition in selling a preparation called Marmola by making misleading and deceptive statements concerning its qualities as a remedy for overweight. The Commission issued a cease and desist order which the Circuit Court of Appeals vacated. 42 F. 2d 430. This Court affirmed the Court of Appeals' judgment saying that there was "neither finding nor evidence from which the conclusion legitimately can be drawn that these advertisements substantially injured or tended to injure the business of any competitor or of competitors generally, whether legitimate or not. . . . It is impossible to say whether, as a result of respondent's advertisements, any business was diverted; or was likely to be diverted, from others engaged in like trade, or whether competitors, identified or unidentified, were injured in their business, or were likely to be injured, or, indeed,

whether any other anti-obesity remedies were sold or offered for sale in competition, or were of such a character as naturally to come into any real competition, with respondent's preparation in the interstate market." *Fed. Trade Comm. v. Raladam Co., supra*, 652-653. It is clear that the reasons for refusing to enforce the Commission's order are grounded upon the inadequacy of the findings and proof as revealed in the particular record then before this Court. Hence, these reasons are not controlling in this case, arising as it does out of different proceedings and presenting different facts and a different record for our consideration.

In 1935, the Commission instituted the present proceedings against Raladam, charging unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Hearings were held and much evidence was heard concerning Raladam's trade methods since the date of the earlier cease and desist order. This time the Commission found with meticulous particularity that Raladam had made many misleading and deceptive statements to further sales of Marmola; that Marmola had many active rivals for the trade of those who were interested in fat-reducing remedies; that Raladam's misleading statements had the "tendency and capacity" to induce people "to purchase and use respondent's . . . preparation or medicine for reducing purposes . . . in preference to and to the exclusion of the products of competitors, . . . and to divert trade to respondent from such competitors engaged in the sale in interstate commerce of medicines, preparations, systems, methods, books of instruction, and other articles and means designed, intended and used for the purpose of reducing weight."

These findings were an adequate basis for the Commission's order. The court below, however, was of the opinion that there was no substantial evidence to support the finding that the alleged unfair methods "substantially injured or tended to injure the business of any competitor." The evidence shows that sales of Marmola to the consuming public are made at retail drug stores throughout the country; that Raladam distributes Marmola both to wholesalers and retailers; that the wholesalers and retailers who sell Marmola also sell numerous other remedies for taking off fat; that the essential fat-reducing element in Marmola is ~~desiccated~~ thyroid, which is also an element in some of the other remedies sold to the public with or without doctors' prescriptions; that many books of instruction on methods of reducing weight are sold

desiccated

in interstate commerce; and that the gross sales of Marmola were from \$350,000 to \$400,000 a year. From this and other evidence the Commission concluded that numerous antifat remedies were offered for sale in the same market as Marmola, and that Marmola was in active competition with them for the favor of the remedy purchasing public.

It is not necessary that the evidence show specifically that losses to any particular trader or traders arise from Raladam's success in capturing part of the market. One of the objects of the Act creating the Federal Trade Commission was to prevent potential injury by stopping unfair methods of competition in their incipency. *Fashion Guild v. Trade Comm'n.*, 312 U. S. 457, 466. And when the Commission finds as it did here that misleading and deceptive statements were made with reference to the quality of merchandise in active competition with other merchandise it is also authorized to infer that trade will be diverted from competitors who do not engage in such "unfair methods." *Federal Trade Comm. v. Winsted Co.*, 258 U. S. 483, 493. The findings of the Commission in this case should have been sustained against the attack made upon them.

Raladam contends here as it did before the Commission and the Circuit Court of Appeals that the judgment of this Court in the first case makes the issues here in controversy *res judicata*, and therefore bars these proceedings. It also contends that the denial by this Court and the Circuit Court of Appeals in the earlier proceedings of the Commission's motion to offer additional evidence with respect to competitors and injury to competition should have a like effect. We think these contentions are without merit, and therefore agree with the court below in its determination that a decision on the merits was appropriate.

The respondent has not sought in this Court to sustain the judgment of the court below on any other ground. Accordingly, the judgment is reversed with directions that the order of the Federal Trade Commission be affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.